sation the market value of land X must be not more than one-third of the value of the land as vacant land immediately before the fire. Near to but not immediately adjoining this land is another freehold land (land Y) of similar acreage with an identical owner occupied building on it not affected at all by the fire, which is acquired at the same time under the Act. The market value of land Y is its full market value as at the date of publication of the section 5(1) notification. Such an absurd and irrational result could not have been intended by the legislature.

The Third Question.

Section 33(1)(d) reads as follows:—

"33.—(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Board shall take into consideration the following matters and no others, namely —

(a) ....

(b) ....

(c) ....

(d) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his... actual earnings."

It is not in dispute that the third appellant was actively trading up to the time of the fire. It is not in dispute that the fire completely destroyed the buildings on the subject land and that at the time of the acquisition the third appellant was not carrying on any trading or business activity on the subject land. In relation to the Third Question, the fundamental question is: were the actual earnings of the third appellant injuriously affected by reason of the acquisition? The Collector submits that the answer must be "No" because the actual earnings were not injuriously affected by reason of the acquisition but by reason of the fire which completely destroyed the buildings on the subject land. The argument is that "actual earnings" must be given its ordinary meaning and could not be construed to include future or potential earnings. The third appellant contends that the answer must be "Yes", the argument being that "actual earnings" must in the context mean provable earnings based on actualities in contrast to speculative earnings.

In our opinion the construction sought to be placed on the expression "actual earnings" by the Collector is wrong. In the context of section 33(1) of the Act, including the provisoes thereto, if loss of future earnings is excluded from being the subject matter of a claim under paragraph (d) of section 33(1), there could never be a claim because there would never be any actual loss. In our opinion, in every case where a claim is made under paragraph (d) for compensation for loss of earnings, the amount of compensation (if any) is a question of fact for the Collector to determine depending upon the evidence placed before him.

Accordingly, in the context of the facts of the present case, the third appellant is entitled to have its claim for compensation for loss of actual earnings considered and to payment of the amount of compensation (if any).

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Shook Lin & Bok; Allen & Gledhill.*

BRUNEI REPORT

SIMPOL BIN AHMAD v. KOH BEE TIN & ANOR.

[O.C.J. (Leonard J.) May 25, 1977]

[Brunei — Civil Suit No. 12 of 1976]

Practice and Procedure — Running down cases — Interlocutory judgment — Application to set aside — Brunei High Court (Civil Procedure) Rules 1970, O. 13 rr. 2, 5 and 13.

This was an application for an order that interlocutory judgment entered herein in default of appearance on February 25, 1976 and the final judgment obtained consequent thereon on March 11, 1977 be set aside on the ground that the interlocutory judgment was a nullity or alternatively on the ground that it was irregularly obtained. The application further prayed that the first and second defendants should have leave to defend and for the costs of the application.

It was argued in this case that the Brunei High Court (Civil Procedure) Rules, 1970 did not permit the entry of interlocutory judgment for damages for pain, suffering and loss of amenities.

Held: (1) under the rules of procedure interlocutory judgments may be entered in an action for tort even where the damages sought are for pain and suffering and loss of amenities and the practice of entering interlocutory judgment in running down cases in default of appearance which has hitherto been accepted as usual in Brunei should continue;

(2) in this case there was good reason for setting aside the judgment in that the statement of claim was admittedly in error in its description as to how the accident occurred; and therefore the interlocutory and final judgments would be set aside on condition *inter alia* that the defendants should enter appearance within 30 days and pay into court the sum of $25,000 (to abide the result of the action) together with a sum of $4,000 on account of costs thrown away as a result of the defendant's failure to appear.

Cases referred to:

(1) *Eyre* v. *Eyre* 45 S.J. 653.

(2) *Evans* v. *Bartlam* [1937] 2 All E.R. 646.

CIVIL SUIT.

F.S. Choo for the defendants/applicants.

David Clidero for the plaintiff/respondent.

Leonard J.: This was an application by summons inter partes on the part of the defendants for an order that the interlocutory judgment entered herein in default of appearance on the 25th of February 1976 and the final judgment obtained consequent thereon on the 11th of March 1977 should be set aside on the ground that the interlocutory judgment was a nullity or alternatively on the ground that it was irregularly obtained. The application further prayed that the first and second defendants should have leave to defend and for the costs of the application. I set aside the interlocutory and final judgments provided that the defendants should within 30 days enter an appearance, and pay into court the sum of $25,000 (to abide the result of the action) together with a sum of $4,000 representing a payment on account of costs thrown away resulting upon the defendants' failure to appear. I made it a further condition that at the trial the defendants should admit that at the time of the accident giving rise to the proceedings the first defendant was driving vehicle registered number B7790 as a result of a request made to her by the second defendant (her husband) over the telephone to the effect that she should "come to town and pick him up".

I further ordered that the plaintiff should remain entitled to the costs already awarded to him in any event and to payment out, after taxation, of the said sum of $4,000 or the amount of the taxed bills of costs whichever should be the less and ordered finally that the costs of this application should be costs in the cause. As the application raised an interesting question of procedure I promised and now give reasons in writing.

I was particularly grateful to Mr. Choo counsel for the first and second defendants not only for his cogent and interesting argument but also because he had prepared and handed up to me a most useful summary of it. The history of the action is as follows: on October 4, 1974 the plaintiff was seriously injured when knocked down by a motor vehicle registered number B7790 at Jalan Kianggeh, Bandar Seri Begawan. The car was driven by the first defendant the wife of the second defendant who was on her way to pick up the second defendant and take him home. The plaintiff issued a generally endorsed writ on the 14th of January 1976 and the writ, together with a statement of claim, was served on the two defendants on the 9th of February 1976. They failed to enter appearance and on the 25th of February 1976 interlocutory judgment for damages to be assessed in default of appearance was entered by the plaintiff. Final judgment was obtained on the 11th of March 1977 for general damages of $50,000 with interest at 6% per annum from the date of the issue of the writ and special damages of $2,950 with interest at 3% from the date of the accident and costs. A not inconsiderable proportion of the general damages was attributable to pain, suffering and loss of amenities.

It was the primary contention of Mr. Choo that the Brunei High Court (Civil Procedure) Rules 1970 did not permit the entry of interlocutory judgment for damages for pain, suffering and loss of amenities. The relevant rules are to be found in Order 13. Rule 2 of that order provides:

"2. Where any defendant fails to appear to a writ of summons and the plaintiff is desirous of proceeding upon default of appearance, he shall, before taking any other proceedings cause to be filed in the registry a certificate of non-appearance together with the original writ or notice in lieu of writ with an affidavit in support thereof."

It was accepted that the plaintiff had complied with this rule. Rule 3 deals with the case where the writ of summons is endorsed for a liquidated demand. As the claim here was for unliquidated damages this rule is inapplicable but it is to be noted that the words used are "is endorsed for a liquidated demand".

Rule 5 of Order 13 reads:

"5(1). Where the writ is endorsed with a claim for pecuniary damages only or for detention of goods with or without pecuniary damages and the defendant fails, or all the defendants, if more than one, fail, to appear, the plaintiff may enter interlocutory judgment, and may set the cause down on motion for the assessment of the value of the goods and the damages, or either of them, as the case may be.

(2). The court or a judge may assess the value and damages, or either of them, in a summary manner, or may order that a statement of claim or particulars shall be filed before any assessment and that the value and the damages or either of them shall be ascertained in any way which the court or judge may direct."

This rule is to be contrasted with Order 13 rule 2 of the Rules of the Supreme Court of England which enables a plaintiff to enter interlocutory judgment in default of appearance, where the writ is endorsed with a claim for unliquidated damages as distinct from "pecuniary damages". In England under Order 37 rule 1 the damages may be assessed by the master. The assessment may be referred to an official or special referee or the action may be ordered to proceed to trial before the judge with or without the jury in respect of the damages (Order 37 rule 4). Of the Brunei rules the only other rule of Order 13 which is of relevance is rule 13 which reads:

"13. In all actions not by this order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially endorsed under Order 3 rule 5, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions when account is claimed, to the provisions of Order 15."

It was Mr. Choo's case that the plaintiff should have gone under rule 13 because, he argued, the term "pecuniary damages" did not include damages for pain and suffering and loss of amenities. He referred me to *Halsbury's* Laws of England 4th Edition Vol. 12 at page 415 in support of this submission. There in paragraph 1110 a distinction is drawn between "pecuniary" and "non-pecuniary" damage. "Pecuniary damage" or "pecuniary loss" it is said:

"Refers to any financial disadvantage, past or future, whether precisely calculable or not. Thus past loss of earnings and an assessment of loss of future earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage. 'Non-pecuniary damage' is exemplified by personal injuries, damage to reputation and interference with the enjoyment of property, although, of course, in each case pecuniary damage may have been sustained as well."

Paragraph 1110 occurs in the introduction to a lengthy article on damages and the measure of damages. It is noteworthy that in the paragraph to which I refer the adjective "pecuniary" qualifies the noun "damage" not the noun "damages". What I am looking for in construing Order 13 rule 5 is the meaning of the term "pecuniary damages". All damages claimed or awarded in a court of law are of their nature pecuniary for the ordinary meaning of that word is "consisting of money". The Latin "pecunia" from which the word derives is somewhat wider in meaning than the word "money", as currency, thus it has been said that

"In a bequest 'money' is a general word. But yet not so large and comprehensive as the word 'pecunia' in the Roman tongue, for such word, in that language, means all the testator's substance, both real and personal that can be converted into money. But the word 'money' in our language answers to the barbarian's Latin word 'moneta' and it is a genus that comprehends two species viz.: ready money and money due." [This quotation is to be found in Stroud's Judicial Dictionary Vol. 3 at pages 1813-4 where it is attributed to Gilbert C.B.]

Unless the word "pecuniary" be regarded in Order 13 rule 5(1) as otiose one would be constrained in the interpretation of that rule to regard the phrase "pecuniary damages" as distinct from "liquidated demand" but as in some way narrower than the unqualified word "damages" and therefore presumably to give to it the meaning given to it in *Halsbury* and so make a distinction between "pecuniary damages" and "non-

pecuniary damages", however much the concept of non-pecuniary damages may offend. The Brunei Rules are modelled on the Singapore Rules of the Supreme Court 1934 and their numbering follows the numbering of the Singapore Rules, in order that reference may be made to *Mallal's* Supreme Court Practice. Reference to that learned author indicates that Order 13 rule 5 was taken from the old English Order 13 rule 5 which came into force in 1883 and was amended in 1902. According to the footnote to Order 13 rule 5 in the *White Book* for 1957 at page 157 the 1902

"amendment applied the rule to actions for damages generally as well as in detinue (see *Eyre* v. *Eyre*;[1] compared Order 27 rule 4)."

There is no note in the 1957 White Book as to the meaning of "pecuniary damages", but it does seem from the reference to *Eyre* v. *Eyre*[1] that in England the word "pecuniary" was disregarded. *Eyre* v. *Eyre* was a slander action heard in 1901 i.e. before the amendment. I have unfortunately been unable to trace the amendment itself but it seems reasonably probable that it resulted as the White Book for 1957 suggests from *Eyre* v. *Eyre*. In that case on the plaintiff's issuing a writ for slander and the defendant's taking no notice of the writ, the plaintiff signed judgment and writ of inquiry as to damages was issued. The defendant moved to set aside the interlocutory judgment on the ground that the same was irregular the irregularity alleged being that no statement of claim had been filed. It is observed in the headnote

"The practice, however appears to be this; that when no appearance is entered to the writ, interlocutory or final judgment as the case may require in default of appearance may be signed by the plaintiff (see *Annual Practice* Order 13 rule 5)."

The Master had held that the judgment was irregular in that no statement of claim had been filed. The defendant appealed. A further part of the headnote reads:

"The plaintiff contended that the judgment had been rightly signed and that the case came within Order 13 rule 5 which provides for cases where the writ is endorsed for a claim for damages for detention of goods and pecuniary damages or either of them and that the words 'or either of them' covered a case like the present where the claim was for pecuniary damages only." (I pause to interpolate that here we have damages for loss of reputation equated with pecuniary damages) "The practice of the court since the Judicature Act 1875 had been in the plaintiff's favour. Under the Common Law Procedure Act 1852 it had been necessary to file a declaration before signing interlocutory judgment, but the policy in the Judicature Act had been to simplify the practice of the courts. If a defendant wished to know the precise claim of a plaintiff he could enter an appearance and require a special claim to be filed. If he then admitted the claim he could make default in filing a defence and the plaintiff could then sign interlocutory judgment. Order 27 rule 2."

[It is to be noted that Order 27 rule 2 also referred to "pecuniary damages".] Later in the same headnote it is remarked that

"The judgment of Chitty J., in *Part* v. *Griffiths* 28 Sol. J. 339 recognised that a claim for pecuniary damages only comes within Order 13 rule 5 and is a binding authority in support of the plaintiff's contention."

What appears to have given rise to difficulty in *Eyre* v. *Eyre* was that claim was for damages for "slander" and it was clear that the plaintiff intended to aver several occasions on which she had been slandered. It was the defendant's case that it was not fair that the plaintiff should be permitted to make allegations against the defendant without the latter having some notice of the various cases he had to meet. It must however be noted that there the irregularity claimed was not the signing of interlocutory judgment but the signing of interlocutory judgment without the filing of a statement of claim. At page 654 Bucknill J. is recorded as having said that he did not want to upset the universal practice by holding that it had hitherto been wrong and he saw a way out of the difficulty by granting relief to the defendant under Order 27 rule 15. He indicated that "there was no doubt that rule 5 of Order 13 if it is intended to apply to a case like the present was about as badly worded as it possibly could be" and that he would communicate with the Rule Committee. *Eyre* v. *Eyre* was decided on July 8, 1901. The amendment took place in 1902 so that the footnote at page 157 in the White Book that the amendment "applied the rule to actions for damages generally" would appear to be justified. If this is to be accepted of course the word "pecuniary" is otiose. *Mallal* appears to be of the same opinion for with reference to the phrase "claim for pecuniary damages only" he says:

"These words include a claim for damages for breach of contract as well as damages for tort for a claim in respect of breach of contract is in fact a claim for damages." (*Mallal's* Supreme Court Practice Vol. 1 page 120).

These factors persuade me that the intention of the amendment which took place in 1902, when apparently the first reference to "pecuniary damages only" appeared, was to enable interlocutory judgment to be entered in an action for tort even where the damages sought are for pain and suffering and loss of amenities or (as in *Eyre* v. *Eyre*) for loss of reputation. I do not see that such a conclusion can work any injustice. This is in the present procedure in England and does not seem to have worked injustice there. I regard it as a highly convenient method of procedure particularly in Brunei where there is no resident judge. Indeed I should have thought that there was a case to be made out for amending Order 13 rule 5 to provide that unliquidated damages might be assessed by the Registrar without an order of the judge in cases where no appearance had been entered. Be that as it may, I can, after examination of the history of the rule see no reason for giving to the word "pecuniary" the restricted meaning given to it in the passage from *Halsbury* which was cited by Mr. Choo. On the contrary I consider that the practice of entering interlocutory judgment in running down cases in default of appearance which has hitherto been accepted as usual in Brunei should continue. Order 13 rule 10 which reads:

"10. Where judgment is entered pursuant to any of the preceding rules of this order, the court may set aside or vary such judgment upon such terms as are just."

gives ample discretion to set aside either interlocutory judgment alone or interlocutory and final judgment. There is no limitation as to time and the discretion it provides is not limited by any rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default (see *Evans* v. *Bartlam*[2] per Lord Atkin at page 650). Referring to Order 13 rule 10 and Order 27 rule 15 Lord Atkin says:

"If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

In the instant case there was, notwithstanding the first defendant's plea of guilty in the magistrate's court and the second defendant's admission to a former legal adviser of the plaintiff that the first defendant was driving at the request of the second defendant who wished her to "come into town to pick him up", good reason for setting aside the judgment in that the statement of claim was admittedly in error in its description as to how the accident occurred. It is possible that on hearing evidence on the facts as outlined to me that the plaintiff may have been, at least partially, to blame for the accident. That was why I set aside the judgment and imposed the somewhat stringent conditions I have already mentioned. Although I was at the time attracted by the persuasive argument of Mr. Choo that the plaintiff should have proceeded under Order 13 rule 13 I was not wholly convinced by it. I am now of the opinion that it was wrong and that Order 13 rule 13 is intended rather to cover cases where equitable remedies such as specific performance and the taking of accounts are sought.

Order accordingly.

Advocates: *Ibrahim, Chee & Co.; Hilborne, Hawkin & Co.*

MALAYSIAN REPORTS

SOM BINTI DAUD & ORS. v. NIK MUSTAFFA BIN NIK IDRIS & ORS.

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Mohamed Zahir J.) June 5 and July 6, 1977]

[Kota Bharu — Federal Court Civil Appeal No. 176 of 1976]

Land Law — Inquiry by District officer — Possessory title given to parties — Appeal to High Court — Claim of superior title — Kelantan Land Settlement Ordinance, 1955, ss. 7, 10 and 16.

In this case the Enquiry officer had held an equiry under the Kelantan Land Settlement Ordinance, 1955. The Enquiry officer originally ordered the land to be registered in the name of the appellants, giving them absolute title. Subsequently on application by the respondents, the District Officer varied the order by giving possessory titles to the appellants and the respondents. The appellants appealed to the High Court which dismissed the appeal, whereupon the appellants appealed to the Federal Court.

Held: as the appellants claimed a title superior to the possessory title, they were entitled to bring an action under section 10 of the Kelantan Land Settlement Ordinance, 1955 and they should be allowed to do so.

Cases referred to:-

(1) *Deraman bin Din & Ors.* v. *Ibrahim bin Mamat* [1975] 1 M.L.J. 142.

(2) *Fatimah* v. *Wok* [1964] M.L.J. 318.

(3) *Deraman bin Din & Ors.* v. *Ibrahim bin Mamat* [1977] 1 M.L.J. 52.

The following case was also cited in argument: *Mat 'Ail* v. *Mek* [1961] M.L.J. 15.

FEDERAL COURT.

P. Dorairaj for the appellants.

Ahmad Rastom for the respondents.

Suffian L.P. (delivering the judgment of the Court, read by Mohamed Zahir J.): We dismissed this appeal, but at the same time gave liberty to the appellants to file suit under section 10 of the Kelantan Land Settlement Ordinance, 1955, and now give our reasons.

This is a dispute regarding a piece of land, Lot No. 1487 in the Mukim of Tepus, District of Bachok, in Kelantan.

There was an enquiry about it under the Kelantan Land Settlement Ordinance, 1955.

At the time of the enquiry the land was registered in the names of the appellants, five daughters of Haji Daud bin Merah ("Daud"). The enquiry officer ordered that the whole of the land be registered in the names of his five daughters, each daughter to have 1/5 undivided share. Obviously, the order was made under section 7, giving each daughter not possessory, but *absolute* title.

The five respondents, dissatisfied with the decision of the enquiry officer, appealed under section 16(1) to the District Officer. The District Officer, after hearing many witnesses, decided on June 29, 1975, to vary the enquiry officer's order as follows: he gave under section 8 each of the daughters possessory title in respect of 2/35 undivided share and each of the respondents also possessory title in respect of 5/35 undivided share.